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U.S. COURTS
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JANET L. BURKE
IDAHO

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

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POCATELLO DENTAL GROUP, P.C., an)
Idaho professional corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE CORPORATION,))
a Washington corporation,)

Defendant.)

INTERDENT SERVICE CORPORATION,))
a Washington corporation,)

Counterclaimant,)

vs.)

POCATELLO DENTAL Group, P.C., an)
Idaho professional corporation; DWIGHT)
G. ROMRIELL, individually; LARRY R.)
MISNER, JR., individually; PORTER)

Case No.: CV-03-450-E-LMB

**VALLEY DENTAL AND DR. LARRY
BYBEE'S REPLY TO INTERDENT
SERVICE CORPORATION'S
OPPOSITION TO MOTION TO
QUASH SUBPOENA**

158

SUTTON, individually; ERNEST)
SUTTON, individually; GREGORY)
ROMRIELL, individually; ERROL)
ORMOND, individually; and ARNOLD)
GOODLIFFE, individually,)
)
Counterdefendants.)
)
_____)
LARRY R. MISNER, JR, individually,)
)
Counterclaimant,)
)
vs.)
)
INTERDENT SERVICE CORPORATION,)
a Washington corporation,)
)
Counterdefendant.)
)
_____)
LARRY R. MISNER, JR., individually,)
)
Crossclaimant,)
)
vs.)
)
POCATELLO DENTAL GROUP, P.C., an)
Idaho professional corporation,)
)
Crossdefendant.)
_____)

COMES NOW, Valley Dental, P.A. and Dr. Larry Bybee ("Bybee"), both of whom are non-parties to this litigation, by and through counsel and offer their reply to Interdent Service Corporation's ("ISC") opposition to their motion to quash the subpoenas served upon them by ISC.

INTRODUCTION

ISC, through its opposing memorandum, has argued that, **had** the Federal Rule of Civil Procedure ("FRCP") 45 procedural issues been discussed, **ISC would have suggested** that Bybee put all subpoenaed material in the mail. ISC appears to now concede that its subpoena as served on Bybee did in fact purport to require Bybee to travel to Boise Idaho to produce the documents¹. Instead, ISC attempts to shift the blame to Bybee for ISC's own failure to suggest that Bybee would be permitted to mail the requested documents in spite of explicit language in ISC's subpoena to the contrary. As discussed below, Bybee contends that (1) reasonable efforts to reach an agreement with counsel for ISC were made by Bybee's counsel and (2) the issue of using the mail need not have been raised by Bybee because a non-party cannot be required to produce documents beyond the 100 mile limitation as outlined in the rule. Furthermore, regardless of the procedural defects raised by Bybee as to ISC's non-compliance with Rule 45, the substantive arguments of relevance were still at issue and ISC served the subpoenas duces tecum knowing full well that Bybee would submit a motion to quash².

¹ The Bybee subpoena is a *subpoena duces tecum* which by definition orders the recipient to appear and bring certain documents. Further, this subpoena reads, "YOU ARE COMMANDED to produce and permit inspection and copying of the following documents and objects at the place [Stoel Rives LLP, 101 South Capitol Boulevard, Suite 1990, Boise Idaho], date and time specified below". Confirming ISC's intent to require Bybee to actually travel to Boise Idaho are the two \$40.00 witness appearance fee checks served with the subpoenas for Dr. Bybee and Valley Dental, P.A.

² ISC admits that counsel for Bybee did discuss with ISC counsel the merits of Bybee's objections based upon relevance prior to filing Bybee's Motion to Quash. See ISC's Opposition to Bybee's Motion to quash, p. 3.

Local Civil Rule 37.1

As demonstrated by ISC's opposition to Bybee's motion to quash subpoenas, with its supporting affidavit from ISC's counsel Mr. Kaplan, reasonable efforts were made to reach an agreement between the opposing attorneys. Mr. Kaplan made it clear during phone conversations that he was going to proceed with serving the subpoenas, regardless of opposing counsel's position on relevancy issues. See the facsimile page attached hereto as **Exhibit "A"** submitted to Mr. Hearn by Mr. Kaplan after their conversation and discussion regarding the merits of ISC's proposed subpoenas. The substantive issues of ISC's subpoenas were discussed and ISC knew even before serving them that Bybee would be submitting a motion to quash. Further, as evidenced in Exhibit "A", ISC also submitted two checks to Bybee's counsel for Bybee in the amount of \$40.00 each to cover attendance fees for the two subpoenas duces tecum.

Bybee concedes that its original motion to quash did not contain an explicit statement regarding the reasonable efforts put forth in settling this dispute. However, as admitted in ISC's Opposition to Bybee's Motion to Quash and this reply memorandum, Bybee did make an attempt to settle the discovery dispute between counsel prior to bringing Bybee's Motion to Quash. The claim by ISC that it "would have" suggested production by mail if counsel for Bybee had just raised an objection is of no merit. Even assuming ISC would have made such a suggestion, counsel for Bybee would still have been free to reject ISC's suggestion to use the mail as not in compliance with FRCP 45. Therefore, the sum of ISC's complaint about the adequacy of Bybee's attempt to resolve the issue is to blame Bybee for not allowing ISC to make a suggestion that Bybee would have rejected for the reasons stated below.

RULE 45(b)(2)

FRCP 45(b)(2) pertains to *service* of a subpoena within the district of the court, not the *production* of documents. ISC has taken the position that because FRCP 45(b)(2) allows service of the subpoena within the district of the court, coupled with FRCP 45(c)(2)(A), they are thus entitled to production of subpoenaed documents at their counsel's Boise office, however Bybee may be able to get them there. Such position ignores FRCP 45(c)(3)(A)(ii), for which FRCP 45(b)(2) is subject. In their opposition to Bybee's Motion to Quash, ISC cites no authority for its contention that Bybee needed only to mail the requested documents to comply with ISC's subpoena³.

In *Anderson v. Gov't of the Virgin Islands*, 180 F.R.D.284, (D. VI 1998), the plaintiff caused a subpoena duces tecum, which was accompanied by a notice of deposition duces tecum, to be served upon the Customs Office in Washington, D.C.. The subpoena commanded the recipient to produce certain documents to plaintiff's attorney's office in St. Croix. A second subpoena accompanied by a notice of deposition duces tecum was then served by the plaintiff upon the commissioner of the United States Customs service. The court, after pointing out jurisdictional defects with the subpoenas, outlined the procedure for which a non-party can be subpoenaed to produce documents. *Id.* at 288.

FRCP 34(c) provides that a non-party may be compelled to produce documents as provided in FRCP 45. Rule 45 also allows the court, on timely motion, to quash a subpoena if it requires a non-party to travel to a place more than 100 miles from the place where the non-party resides, is

³ In all candor to this Court, Bybee does hereby note the existence of authority from outside this jurisdiction supporting ISC's legal position. See *Stewart v. Mitchell Transport*, 2002 U.S. Dist. LEXIS 12958 (D. Kan. 2002). Therefore, it appears at this time that the law is not firmly established on this issue.

employed, or regularly transacts business. “Reading Rules 34 and 45 in tandem, a non-party can be compelled to produce documents within certain geographic limitations, usually no more than 100 miles from the non-party’s location.” *Id.* at 289. “Furthermore, plaintiff’s counsel cannot direct the recipient of a subpoena to produce documents to a place outside the geographic limitations of Rule 45.” *Id.* at 290. Finally, the court, in quashing the subpoenas and awarding sanctions against the plaintiff for non-compliance with Rule 45 pointed out, *inter-alia*, plaintiff’s wrongful “demand to produce the documents to a location beyond the 100-mile limit allowed under the federal rules. Although these defects may seem merely procedural in nature, they are the safeguards mandated by Rule 45 that are intended to prevent the abuse of the subpoena process.” *Id.* at 291.

Interestingly enough, and obviously important to the court in its determination to quash the subpoenas and award sanctions, the court pointed out other procedural defects with plaintiff’s subpoenas that are also prevalent in this matter. “The subpoena also failed to include the text of subdivisions (c) and (d) of Rule 45 as mandated by the rule.” *Id.* at 290. Rule 45 states, “Every subpoena *shall* . . . set forth the text of subdivisions (c) and (d) of this rule.” *Fed. R. Civ. P. 45(a)(1)(D)* (emphasis added). Because Bybee’s subpoenas do not contain the required text, they are facially defective.⁴

⁴ See also *Matthias Jans & Associates, LTD v. Dropic*, 2001 U.S. dist. LEXIS 4841, 49 Fed. R. Serv.3d (Callaghan)1239 (W.D. Mich. 2001) (“A subpoena *must* be quashed or modified if it purports to require a nonparty to travel to a place more than 100 miles from his or her residence or employment”) (italics in the original). Regardless of what ISC might have suggested to Bybee’s counsel, it cannot reasonably dispute that its subpoena “**purports** to require a nonparty to travel to a place more than 100 miles from his or her residence or employment”(emphasis added).

RELEVANCE

Even construing relevancy as broadly as possible, the information requested by ISC from Bybee is simply not relevant. ISC is seeking (1) all contracts, including any management agreements, between Bybee and another non party (2) all employment and non-compete contracts entered into by Bybee with anyone (3) any business plan submitted to Wells Fargo Bank by Bybee (4) documents identifying any of Bybee's patients who once were patient's of Pocatello Dental Group ("PDG") and (5) documents identifying all revenues received by Bybee for treatment of former PDG patients. *See Bybee's Motion to Quash, Exhibit A.* Bybee will now address each request and ISC's claimed basis for its request in the order presented above.

Nos 1 and 2. Despite ISC's "arguments" to the contrary, Misner is not a party to any of these requested agreements⁵. *See ISC's Opposition to Bybee's Motion to Quash*, p. 5 ("may show, for example, that Misner's complaints are indeed pretextual if . . . he and Bybee entered into a substantially similar agreement"). Absent some evidence that Misner "entered into" these agreements, ISC has not, and cannot, show any relevance of their contents to Misner. Next ISC claims that the "agreements may also support ISC's argument that the provisions of its management are commonplace". *See ISC's Opposition to Bybee's Motion to Quash*, p. 5. ISC cites no authority (nor could it) for their contention that a party can simply subpoena the records of non-parties to establish the standard by which its own conduct should be judged. Even assuming the requested documents were identical to the ISC agreements at issue here, that fact would have absolutely no

⁵ While Misner is an employee of Valley Dental, P.A., there may be no written employment agreement. If such an employment agreement does exist, ISC should request it from Misner before attempting to secure it from Valley Dental, P.A..

relevance to the legality of the ISC agreements in this case. An illegal contract is unenforceable in Idaho without regard to whether other similar contracts not before the court do or do not exist. Finally, ISC mistakenly raises the issue of Bybee's designation by PDG as an expert in this case. *See ISC's Opposition to Bybee's Motion to Quash*, pp. 5-6. Rule 45 cannot be used as a vehicle to obtain discovery from retained experts outside the procedures identified in Rule 26(b)(4). *See Marsh v. Jackson*, 141 F.R.D. 431, 432 (W.D. Va. 1992).

No 3. Misner has admitted that he has left PDG and is now practicing dentistry as an employee of Valley Dental, P.A. in Pocatello. If ISC believes that Misner submitted a "business plan to Wells Fargo", ISC should at least initially attempt to subpoena that business plan from Misner. ISC claims that the business plan is relevant to damages but it is difficult to see how a non-party's business plan projections submitted to a bank are relevant to damages to a claim against one of its employee's for breach of a covenant not to compete.

Nos 4 and 5. ISC's requests for the records pertaining to current or former PDG patients currently being treated by Bybee and the revenue generated are also irrelevant. Bybee does not have a non-compete contract with ISC, nor is he a party to this litigation. Asking Bybee for these records is the same as asking every dentist in the surrounding Pocatello area for their records of former PDG patients. There is nothing wrong with Bybee treating former PDG patients and him doing so is irrelevant to these matters. If ISC wants Misner's records of current or former PDG patients, then those records need to be subpoenaed from Misner, not Bybee.

Throughout its Opposition to Bybee's Motion to Quash, ISC attempts to "fudge" the distinction between the possession of documents and the relevancy of those documents to Misner. "Misner and Bybee intentionally structured their business relationship so that **Bybee had possession**

of documents relating to Misner's relationship with OCA and the financial harm their competition is doing to ISC." *ISC's Opposition to Bybee's Motion to Quash*, pp 4-5 (emphasis added). No one would dispute that ISC would be entitled to seek documents relating to Misner as a party from Bybee as a non-party in possession of those documents relating to Misner. But, ISC has not sought from Bybee any documents relating to Misner, *i.e.*, alleged agreements between Misner and other non-parties or documents showing any former PDG patients treated by Misner in the physical possession of Bybee. Instead, ISC has impermissibly asked Bybee to produce documents according to the explicit language of its subpoena relating only to Bybee, *i.e.*, alleged agreements between Bybee and other non-parties and documents showing any former PDG patients treated by Bybee. If ISC's subpoena had sought relevant documents relating to Misner, this dispute over the alleged relevancy of documents relating solely to Bybee would have been avoided.

CONCLUSION

For the foregoing reasons, Bybee respectfully requests this Court to quash the subpoenas issued by ISC.

DATED this 2 day of August, 2004.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____

STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of August, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Gary L. Cooper
Ron Kerl
Cooper & Larsen, Chartered
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Pocatello, Idaho 83205-4229
Facsimile: 1-208-235-1182

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile

Erik F. Stidham
G. Rey Reinhardt
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July 8, 2004

VIA FACSIMILE

Richard A. Hearn, M.D.
Racine Olson Nye Budge & Bailey, Chartered
201 East Center
PO Box 1391
Pocatello, ID 83204-1391

Re: *Pocatello Dental Group, P.C. v. InterDent Service Corporation, etc.*, U.S. District
Court (Idaho) Case No. CV-03-450-E-LMB

Dear Rick:

Enclosed are document subpoenas to Valley Dental, P.A. and Dr. Bybee. Although I understand you will likely move to quash the subpoenas, please let me know if you will accept service on behalf of your clients. If you are willing to do so, I will forward the witness fees to you.

Please let me know if you have any questions.

Very truly yours,



Scott J. Kaplan

SJK:dmv

Enclosures

cc: Mr. Kevin Webb (via e-mail)

Oregon
Washington
California
Utah
Idaho

EXHIBIT "A"